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SUPREME COURT, U.S.
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No.

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IN THE

Supreme Court of the United States

October Term, 1995

THE CITY OF CHARLESTON and THE
CITY OF SOUTH CHARLESTON,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;
BOYCE GRIFFITH, Chairman; OTIS D. CASTO,
Commissioner; RICHARD D. FRUM, Commissioner;

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the appropriate standard for deciding whether an impairment of municipal bond contract covenants is "substantial," and, therefore, a violation of the Contract Clause?

2. On review of Cross-Motions for Summary Judgment, did the Court of Appeals, in reversing judgment *for* Petitioners and directing judgment for Respondents, apply the correct standard, under F.R.C.P. 56, to Petitioners' evidence (viewing it in the light most favorable to Petitioners)?

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INTRODUCTION

The City of Charleston, West Virginia, and The City of South Charleston, West Virginia, ("Cities") petition for a Writ of Certiorari to the June 9, 1995, opinion of the United States Court of Appeals for the Fourth Circuit. Petitioners submit this statement to demonstrate that the Supreme Court has jurisdiction of the Writ of Certiorari and it should exercise that jurisdiction to review the decision of the Court of Appeals.

OPINIONS BELOW

The June 9, 1995, opinion of the United States Court of Appeals for the Fourth Circuit is reported in 57 F.3d 385 and is attached as Appendix A. The Court of Appeals reversed the District Court's Summary Judgment for the Cities, and directed entry of Summary Judgment for Respondents.

The District Court for the Southern District of West Virginia, on Cross-Motions for Summary Judgment, had granted the Cities' Motion by unreported Memorandum Opinion dated September 1, 1994, attached as Appendix B, and had granted the Cities' requested relief in an unreported Judgment Order entered September 1, 1994, attached as Appendix C.

JURISDICTION

The jurisdiction of this Court to review the June 9, 1995, opinion of the United States Court of Appeals is conferred by Title 28, United States Code, Section 1254.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Cities' case is based upon the Contract Clause of the United States Constitution, Article I, § 10, Cl. 1:

> No state shall. . . pass. . . any Law impairing the Obligation of Contracts. . . .

The Cities claim that a statute passed by the West Virginia Legislature in 1990 impaired their obligation, under pre-existing municipal bond contracts, to place liens for delinquent sewer charges on all "premises served," and to collect from the owners of those premises, by amending into W. Va. Code § 8-18-23[1] the following proviso:

> [A]n owner of real property may not be held liable for the delinquent rates or charges for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for services or facilities of a tenant of such real property unless the owner has contracted directly with the municipality to purchase such services or facilities.

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[1] For full text of W. Va. Code § 8-18-23, see Appendix D.

The West Virginia Legislature left unchanged W. Va. Code § 16-13-16[2], incorporated into the Bond Contracts by reference and by law, which provides, regarding sewer charges, that:

> . . . charges for the use of and the service required by such works, [are] to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses such works. . . . All such rates or charges, if not paid when due, shall constitute a lien upon the premises served by such works . . . . Whenever any rates, rentals or charges . . . remain unpaid . . . the property and the owner thereof, as well as the user . . . shall be delinquent. . . .

STATEMENT OF THE CASE

Petitioner City of Charleston, West Virginia, is a municipality providing sewer service to 24,047 customers. Petitioner City of South Charleston, West Virginia, is a municipality providing sewer service to 6,111 customers.

Respondents are The Public Service Commission of West Virginia, a state government agency which regulates public utilities, and its three Commissioners, in their official capacity.

Prior to 1989, Petitioner Cities sold five municipal bond issues to finance improvements to their sewer systems.

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[2] For full text of W. Va. Code § 16-13-16 see Appendix E.

The bonds are written contracts between the Cities and the bondholders. The bond contracts contain explicit covenants, and incorporate, by reference and by law, certain statutes.

Among the explicit covenants in the bond contracts were promises by the Cities that all charges for sewer service, if not paid when due, would be "a lien on the premises served," and that ". . . the property and the owner thereof, as well as the user of the services . . ." would be liable for the payment of the charges.

One of the statutory provisions forming a part of the bond contracts by law is W. Va. Code § 16-13-16 (attached as Appendix E), which requires a municipality issuing sewer revenue bonds to establish rates for services ". . . *to be paid by the owner* of each and every lot, parcel of real estate or building that is connected with and uses such works. . . " and further provides: "All such rates or charges, if not paid when due, *shall constitute a lien upon the premises served* by such works." (Emphasis supplied.) This statutory provision is incorporated into the bond contracts by specific reference as well.

The legislative enactment at issue is an amendment of *W. Va. Code* § 8-18-23(c), effective June 8, 1990 (attached as Appendix D). In the 1990 Act, a proviso was added to *W. Va. Code* § 8-18-23(c), stating:

> Provided, That an owner of real property may not be held liable for the delinquent rates or charges for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for

services or facilities of a tenant of such real property. . . .

Thus, the 1990 Act created an exemption from sewer liens and owner responsibility only for municipally-served rental property. The 1990 Act did not amend *W. Va. Code* § 16-13-16. Further, the 1990 Act did not prohibit public service districts from placing liens for unpaid sewer charges on rental properties, or from collecting from owners of rental properties.

On March 30, 1992, in response to complaints from landlords, Respondent Public Service Commission of West Virginia ("PSC") issued two orders retroactively applying the 1990 Act to the Cities, despite the language in the bond contracts and the unaltered commands of *W. Va. Code* § 16-13-16. The PSC ruled that the 1990 Act prohibited the placing of liens on the property of landlords whose tenants failed to pay their sewer bills, and that the 1990 Act relieved a landlord/property owner from responsibility for payment for sewer service rendered to his rental property by a municipality unless the landlord/property owner has specifically contracted for the service rendered.

The Cities then filed a Complaint in the District Court alleging that the PSC's Orders, applying the 1990 Act to them, violated the Contract Clause by prohibiting them from placing liens on rental premises for which sewer bills were not paid, and by prohibiting them from collecting those bills from the property owners, so long as the previously existing bonds remained outstanding.

The Cities and the PSC both filed Motions for Summary Judgment. In support of their Motion, the Cities

established by affidavits (attached as Appendices F and G) that while 34.5% of Charleston's total sewer service accounts were rental properties, 73.3% of Charleston's *delinquent* accounts were rental properties; and that while 15.7% of South Charleston's total accounts were rental properties, 64.4% of South Charleston's *delinquent* accounts were rental properties.

These affidavits revealed that Charleston's delinquency rate for rental properties was 14.6%, and for owner-occupied properties 2.8%. South Charleston's delinquency rates were 64.7% for rental properties, and 6.7% for owner-occupied properties.

The Cities also established by Affidavit (attached as Appendix G) that Charleston "would have continued to place liens for unpaid sewer charges on rental properties, and would have continued to use every lawful means available to collect unpaid sewer charges from all those liable, including owners of rental properties", if the PSC had not issued its March 30 Orders.

The "Affidavit of Daniel B. Yonkosky" (attached as Appendix F) stated that the West Virginia Water Development Authority ("WDA"), owner of both of Charleston's bond issues and of South Charleston's 1986 bond issue, specifically bargained for and received the lien covenants from the Cities. The WDA considered the obligations of the Cities to place liens on "all premises served" to be "important financial security provisions;" and that it believed the prohibition of liens on rental property to have deprived it "of a substantial part of the means to ultimately collect the money that the Cities owe it."

The Cities also presented the District Court with the deposition testimony of George Farley, who introduced the bill which became the 1990 Act. He testified that he introduced the bill at the behest of two landlords from his county. The bill was not addressed to any broad or general problem, and was only motivated by the fact that the placement of sewer liens on rental property "did not seem fair."

The PSC told the District Court that the only public purposes served by the 1990 Act were the elimination of an "inequity" and the benefit of the receipt of other revenues. The PSC was unable to explain why such purposes are served by the landlord exemption from municipal sewer liens and payments, when public service districts (another form of political subdivision providing sewer service) continued to be allowed to place such liens and collect from landlords.

The Cities' affidavits also established that the Cities operated several public service district sewer systems immediately adjacent to their boundaries, and connected to the Cities' own sewer systems. There were no differences in the economic and social characteristics of the areas served by the Cities' systems and the public service districts' systems, and there were no broad or general social or economic problems affecting municipalities which did not equally affect public service districts.

Thus, the uncontradicted evidence before the District Court was that there was no justification for prohibiting sewer liens on rental property in municipalities, while leaving them on (1) owner-occupied property in municipalities, and (2) on all premises served by public service districts, other than to

confer a special benefit on landlords who own rental property in municipalities.

The two Affidavits filed by the PSC in support of its Motion in the District Court concerned only the overall financial condition of the Cities' sewer systems, and whether they had made their bond payments. The Cities did not deny that they had made all payments on their bonds when required. (Impending financial ruin is not an element of an impairment claim.) The PSC did not contradict the fact that large percentages (34.5% and 15.4%) of the Cities' accounts are rental property accounts, or that the 1990 Act prohibits placement of liens on those properties and collection from their owners, or that the WDA, as owner of the bonds, expected to receive the Cities' covenants to place liens on *all* premises served, rental and owner-occupied alike, or that this was an important security provision in the eyes of the WDA.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals Erred In Its Analysis Of Whether The Impairment Of The Cities' Municipal Bond Covenants Was A Substantial Impairment.

A. The opinion below correctly observed that the Supreme Court has not provided a clear standard.

The opinion below, in beginning its analysis of whether the impairment here was "substantial," noted that the

Supreme Court "has provided little specific guidance as to what constitutes a 'substantial' contract impairment." [Citation omitted.] (Appendix A, p. 17(a)) As the Fourth Circuit recently noted in *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994), there is a wide spectrum between an acceptable "technical" impairment and the unacceptable "total repudiation" of a contract. "The ground between these spectral ends, though, has yet to be charted with any precision." 6 F.3d at 1017.

The Supreme Court should take this opportunity to clarify this area of Contract Clause jurisprudence. Lower courts, both state and federal, have reached widely varying results on similar facts, due to this imprecision. It is important, in a time of some uncertainty in the municipal bond markets, to clarify that bonds are afforded special status under the Contract Clause. Repeal of bond covenants, for no reason other than to benefit a special interest group, should always be considered a substantial impairment.

B. The opinion below errs in mixing standards from cases involving public contracts with those from cases involving private contracts.

In *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), ("U.S. Trust"), the United States Supreme Court addressed a factual situation so similar to the facts here that the decision in *U.S. Trust* has controlling effect. However, the Court of Appeals did not recognize that later Supreme Court Contract Clause decisions do not involve governmental financial obligations , as did *U.S. Trust*, and, therefore, misapplied those cases.

Since the decision in *U.S. Trust* in 1977, several Supreme Court cases have discussed the Contract Clause, but none of these subsequent cases involved a municipal bond contract, which is subject to a higher level of scrutiny. However, the Court of Appeals relied heavily on these cases, and made the fundamental error of not recognizing this Court's "higher level" of protection of municipal bond contracts.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) reh. den. 439 U.S. 886, the contract at issue was a private pension plan, which was altered by a Minnesota statute. The Court held that the statute at issue clearly violated the Contract Clause, because it "was not even purportedly enacted to deal with a broad, generalized economic or social problem." In addition, "It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships - irrevocably and retroactively." 438 U.S. at 250. This case extended the *U.S. Trust* holding to a contract between private parties.

In *Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981), then-Circuit Judge (now Justice) Breyer wrote that *U.S. Trust* "suggests moderately close court scrutiny of legislation that conflicts with prior *public* contracts." He compared the different levels of deference to be accorded legislative acts affecting *public* and *private* contracts. He then observed:

> More importantly, *United States Trust* limits its stricter "review" approach to state laws in the "financial" area - laws which impair a state's "financial obligations."

* * *

> . . . we note that the *United States Trust* facts presented a paradigm of the type of protection that the Contract Clause was designed to offer - a protection given to those who invested money, time and effort against loss of their investment through explicit repudiation. [Citations omitted.]

666 F.2d at 642.

Two years later the difference in analysis was explicitly stated in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983): "In *United States Trust Co.*, but not in *Allied Structural Steel Co.*, the State was one of the contracting parties. When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the court has held a governmental unit to its contractual obligations when it enters financial or other markets. [Citations omitted.] When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the States' self-interest is at stake.' [Citation omitted.]" 459 U.S. at 412, n. 14.

This Court's most recent Contract Clause case is *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992). Justice O'Connor stated the Court's method of analyzing a Contract Clause claim as follows:

> Generally, we first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship."

> [Citations omitted.] This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. Normally, the first two are unproblematic, and we need address only the third.

112 S. Ct. at 1109-1110.

This methodology was adopted in the opinion below, but without recognition of the "public" and "financial" nature of the Cities' bonds. This omission skewed the resulting analysis against the Cities.

"The Supreme Court has not examined the constitutionality of a state law which impairs a public contract since *U. S. Trust*. The Court's decisions in *Energy Reserves Group* and *Exxon* do not indicate that the Court would defer to state legislatures when public as opposed to private contracts are at issue." *State of Nevada Employees Ass'n., Inc. v. Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990). This case is an appropriate vehicle for clarifying when an impairment of a bond covenant is "substantial."

C. The opinion below errs in finding that the standard should be lower for a regulated industry.

The opinion below made much of the fact that sewer utilities are regulated by the state. (Appendix A, pp. 14(a)-16(a), 18(a)-19(a).) This emphasis is wrong as a matter of law, and misplaced since that regulation never extended to municipal bond covenants.

In *Continental Illinois National Bank v. State of Washington*, 696 F.2d 692 (9th Cir. 1983), appeal dismissed, 460 U.S. 1077 (1983), reh. den. 461 U.S. 950 (1983), the Court of Appeals affirmed the District Court's judgment that municipal bond contracts had been impaired, even though the State of Washington had historically regulated electric power production (the financing of which led to the bond issue which was impaired), and the operation of its political subdivisions. These factors were not sufficient to save the statute from a Contract Clause challenge. 696 F.2d at 702.

While the fact of regulation is apparent, it is also clear that the PSC has no authority over the terms of municipal bond contracts. This argument was rejected in *Continental Illinois National, supra:*

> Defendants also argue that a municipal corporation, such as WPPSS, remains subject to state regulation and cannot be allowed to contract itself out from state control. That argument misperceives the nature of the restriction on state action imposed by the contract clause. As a creature of the state a municipal corporation derives its power from the legislature. Once having granted certain powers to a municipal corporation, which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature (or here, the electorate) is not free to alter the corporation's ability to perform. (Citations omitted.) WPPSS remains subject to state regulation, but if the State significantly alters WPPSS's ability

> to perform previously negotiated agreements, it impairs obligations of contract.

696 F.2d at 699-700

However, the Court of Appeals here chose to ignore this case. It also erred in relying on West Virginia cases regarding the pervasiveness of public utility regulation. Every case upon which it relied involved contracts setting *rates*. None was a municipal bond case.

Several recent cases have found impairment in heavily regulated industries. In *Caritas Services, Inc. v. State, DSHS*, 123 Wash.2d 391, 869 P.2d 28 (1994), the Supreme Court of Washington considered a public contract impairment claim under the United States Constitution, regarding Medicaid reimbursement methodology agreements. The Court noted that the United States Supreme Court had "consistently affirmed 'a dual standard of review' for impairment of contract cases," and noted public contracts receive "more stringent examination under the Contract Clause" than do private contracts. 123 Wash.2d at 403, 869 P.2d at 35 n.6.

In dealing with the question of whether the impairment is substantial, that Court found that "[a] contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value." 123 Wash.2d at 404, 869 P.2d at 36.

Given the Medicaid program's "wide and heavy net of regulation," the Washington Court confronted the argument that such regulation defeats an impairment claim.

> . . . the seminal case on this aspect of contract clause doctrine limited itself to state

> impairment of private contracts, not public contracts. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14, 103 S. Ct. 697, 705 n.14, 74 L.Ed. 2d 569 (1983).
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> * * *
>
> In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. *Energy Reserves*, at 412 n.14, 103 S. Ct. at 705 n.14.
>
> * * *
>
> The set of expectations defined by heavy regulation does not and cannot include the expectation that a state will retroactively abrogate its contracts in violation of the contract clause.

123 Wash.2d at 405-06, 869 P.2d at 36.

In *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3rd 383 (8th Cir. 1994), the Court held that a statute regulating franchise transfers impaired pre-existing franchise contracts. The Court noted that franchise arrangements had been heavily regulated by the state. However, the fact of such regulation did not serve to justify the impairment. That Court observed:

> We do offer, however, some observations on a very troublesome aspect of current Contract-Clause jurisprudence. The Supreme Court has held that in determining

> whether an impairment is substantial, and thus unconstitutional, a court should take into account whether the kind of contract or relationship that furnishes the subject matter of the dispute had previously been the subject of regulation. In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 250, 98 S.Ct. 2716, 2725, 57 L.Ed.2d 727 (1978), for instance, the Court said that the relevant inquiry was whether the disputed legislation operated "in an area already subject to state regulation at the time the company's contractual obligations were originally undertaken," or whether, instead, it "invaded an area never before subject to regulation by the State." A later case states the matter a little differently and, perhaps, more narrowly. In Energy Reserves Group, Inc. v. Kansas Power and Light co., 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983), the Court indicated that the proper consideration was "whether the industry the complaining party has entered has been regulated in the past." The idea, evidently, is that if the party to the contract who is complaining could have seen it coming, it cannot claim that its expectations were disappointed.

29 F.3d at 384-85.

Here, the "regulation" found by the Court of Appeals is general oversight of public utilities, which was unaffected by the District Court's ruling. The PSC has *never* regulated the terms or enforcement of municipal bond contract covenants, so the opinion below should not have used the

"regulated industry" factor to find the impairment not substantial.

D. A correct analysis shows substantial impairment.

U.S. Trust, supra, involved statutory covenants in bonds issued by the Port Authority of New York and New Jersey, which promised that the Port Authority would not use any of its revenue for railroad acquisitions, unless certain stringent financial requirements were met.

In 1972, the two states' Legislatures repealed, *prospectively,* this financial limitation, leaving the statutory covenant in force until the bonds containing it had been paid off, while removing that specific covenant from the provisions of any bonds issued in future. However, two years later, in 1974, the two states enacted statutes to repeal the covenant retroactively. 431 U.S. at 14.

This fact pattern is crucial. The Cities would have no complaint if the 1990 Act had been construed to apply only prospectively, like the 1972 enactment in *U.S. Trust.* It is the retroactive application of the 1990 Act to previously issued bonds which makes its effect like the retroactive 1974 enactment in *U.S. Trust.*

The Supreme Court began its analysis in *U.S. Trust* by examining the question whether the retroactive repeal of the statutory covenant did, in fact, impair ". . . the obligation of the States' contract with the bondholders. It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate

those between private parties. [Citations omitted.]" 431 U.S. at 17.

The Supreme Court noted that the parties ". . . sharply disagree about the value of the 1962 covenant to the bondholders. . . ." However, the Supreme Court disposed of this factual dispute as irrelevant and immaterial to its decision, stating:

> As a security provision, the covenant was not superfluous; it limited the Port Authority's deficits and thus protected the general reserve fund from depletion. Nor was the covenant merely modified or replaced by an arguably comparable security provision. Its outright repeal totally eliminated an important security provision and thus impaired the obligation of the States' contract. [Citation omitted, footnote omitted.]

431 U.S. at 18-19.

In this case, the Cities clearly showed the lien covenant was not "superfluous."

Moreover, a contract to which a state is a party is evaluated under a higher standard than would be applied to a statute impairing the obligation of a contract between two private parties. This constitutional standard is higher still when the state's own contract involves financial matters. "Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned." 431 U.S. at 24. Despite the argument that such contracts involve

relinquishment of a state's spending or taxing powers, ". . . the Court has regularly held that the States are bound by their debt contracts." 431 U.S. at 24. (Footnote omitted.) The Court discussed several cases involving impairment of municipal bond contracts, stating: "State laws authorizing the impairment of municipal bond contracts have been held unconstitutional." 431 U.S. at 25, n. 22.

The Supreme Court went on to note that subsequent modifications were not absolutely barred. The impairment may be constitutional ". . . if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." 431 U.S. at 25-26. On the other hand, "total destruction" of a financial obligation is not necessary before its impairment will be found to be unconstitutional. (The trial court had erroneously applied a "total destruction" test.) The Supreme Court then observed that *only one time in the twentieth century* had it sustained alteration of a municipal bond contract, 431 U.S. at 27, and said it would not "balance away" the Contract Clause. The Court held that the repeal of the bond covenant was a violation of the Contract Clause.

The 1990 Act is very similar to the legislation invalidated in *U.S. Trust*. The explicit and the statutory covenants include a promise by the Cities that they will enact, enforce and *collect* rates and charges "to be paid by the owner of each and every lot, parcel of real estate or building, and that "All such rates or charges, if not paid when due shall constitute a lien upon the premises served by such works."

The 1990 Act impaired these statutory covenants by banning the statutorily-required lien (which attaches to "premises served," not to customers or users), and the required collection from the owners thereof. Thus, the lien, and the ability to collect from property owners, has been eliminated as to rental properties, but not as to owner-occupied properties.

II. The Decision Of The Court of Appeals Conflicts With Those Of Other Courts On The Substantial Impairment Issue.

A. The opinion below conflicts with decisions of other Courts of Appeals.

A comparison of the facts in this case with other decisions of various courts of appeals indicate a wide variation in application of the "substantial impairment" standard. The Supreme Court should take this opportunity to provide guidance in this area.

For example, it is hard to reconcile the opinion below with the Fourth Circuit's earlier opinion in *Baltimore Teachers Union v. Mayor and City Council of Baltimore,* 6 F.3d 1012 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1127 (1994), where a five-month minor pay reduction amounting to 0.95% of annual salary, *was* held substantial. *See also Continental Illinois National Bank, supra,* (requirement of voters' approval for additional financing held substantial impairment of existing bonds by Ninth Circuit); *Holiday Inn Franchising, Inc., supra,* (alteration of franchise transfer and termination terms held substantial by Eighth Circuit); and *State of Nevada*

Employees Assoc., Inc., supra, (minor alteration of pension withdrawal rights held substantial by Ninth Circuit).

B. The opinion below conflicts with decisions of state supreme courts.

A number of state supreme courts have found a violation of the Contract Clause by impairments much less substantial than that here. In *New Jersey Highway Authority v. Sills*, 109 N.J. Super. 424, 263 A.2d 498 (Ch. Div. 1970), supp. opinion, 111 N.J. Super. 313, 268 A.2d 308 (Ch. Div. 1970), affirmed p.c.o.b., 58 N.J. 432, 278 A.2d 489 (1971), a statute was enacted exempting National Guard members and Army Reservists from payment of turnpike tolls. The lost revenue was estimated to be $27,300, out of total revenues of over $46,000,000, and the Court noted that ". . . I cannot foresee any possibility that toll-free passage by guardsmen and reservists as provided in the two statutes will ever cause a default on bonds now outstanding or will ever create a situation which might threaten a default." 268 A.2d at 309. Nevertheless, the bond contracts were held to be substantially impaired.

In *Patterson v. Carey*, 41 N.Y.2d 714, 363 N.E.2d 1146 (1977), a statute rescinding a toll road rate increase was found to be an unconstitutional impairment of bond contracts. The trial court had found that the Authority would not default due to the impairment. (". . . this loss of revenue will not endanger the security of said bonds and will not precipitate any actual default . . ." 370 N.Y.S.2d 783, 792 (Sup. Ct. 1975).) In upholding and expanding the trial court's finding of impairment, the Court of Appeals of New York stated: 'Since the toll is the sole source of funds for bond repayment, any limitation on the Authority's power to collect a toll

sufficient to pay the bonds deprives the bondholders of an essential attribute of their contract with the authority and with the State and jeopardizes their investment . . . . With the present statute, the Legislature has diminished the bondholders' rights by suspending one increase and limiting the Authority's previously broad discretion to impose future increases. Thus, the statute has deprived the bondholders of a right granted by their contract with the Authority and the State." 363 N.E. at 1152.

Similarly, the Supreme Court of Illinois, in *George D. Hardin, Inc. v. Village of Mt. Prospect*, 99 Ill.2d 96, 457 N.E. 2d 429 (1983), found a minor modification of forty year old special assessment bonds to be a substantial impairment.

These cases, and the Washington Supreme Court's decision in *Caritas Services, supra,* to which the Court of Appeals' attention was directed, are not mentioned in the opinion below. They constitute a conflict in interpretation between state and federal courts as to the meaning of "substantial impairment," which conflict calls for the Supreme Court's attention.

III. The Court of Appeals Applied An Improper Standard In Evaluating The District Court's Grant Of Summary Judgment To the Cities.

A. In directing entry of judgment for the PSC, the opinion below does not view the Cities' evidence in the light most favorable to the Cities as non-moving party.

In reviewing a grant of summary judgment, an appellate court should apply the same standard as the District Court applies under F.R.C.P. 56, and should view the evidence in the light most favorable to the non-moving party, and should afford the non-moving party the benefit of all reasonable inference to be drawn from the evidence. *Adkins v. G. D. Searle & Co.*, 971 F.2d 132 (8th Cir. 1992).

The opinion below fails to properly apply this standard, which requires shifting that "favorable light" one hundred eighty degrees when evaluating *cross* Motions for Summary Judgment. First, in deciding whether to affirm the judgment appealed from, the appellate court must cast the "favorable light" on the losing party below. Then, if the appellate court determines that the trial court erred, and must, therefore, decide whether the trial court should have granted the losing party's Cross-Motion, the appellate court must shift that "favorable light" to shine on the evidence of the prevailing party below. Rarely, if ever, should this result in the appellate court directing judgment *for* the losing party below, rather than remanding for trial.

B. The opinion below did not fairly read the bondholders affidavit.

The opinion below violates this standard and, in fact, goes out of the way to mischaracterize the Cities' evidence, especially the two Affidavits attached to this Petition as Appendices F and G. For example, the opinion below unfairly characterizes the Yonkosky Affidavit (Appendix G), and refused to recognize that the PSC did not contradict any of the statements of Mr. Yonkosky as to what the WDA bargained for in purchasing the bonds. Since this evidence was not contradicted by the PSC, it was properly relied upon by the District Court. The Cities' undisputed proof was that the purchaser of the bonds has been deprived of an important

financial security provision. The Court of Appeals should have recognized this point, and, at the least, remanded the case for trial, rather than directing summary judgment for the PSC.

The PSC's evidence was infected with a fundamental error that was correctly recognized and dismissed by the District Court, but which was accepted by the Court of Appeals, that of assuming that "impairment of the obligation of a contract" is a constitutional violation only if it impairs the ultimate "performance" of the contract. In other words, if the Cities do not default on their bond payments, there is no impairment. Analysis of the Cities' financial condition, or asking if they have defaulted, is not the test. The obligations impaired are explicit contractual agreements with bondholders that the Cities will place liens on "premises served" when bills are not paid, and will collect from the "owner thereof."

The PSC argued, and the Court of Appeals apparently agreed, that, since the Cities are still paying their bondholders on time, there is no impairment. As the District Court correctly held, the Constitution protects "obligations" not just "performance." The fact that the Cities are still able to meet their bond payments is not dispositive of the issue whether or not the bond contracts have been impaired. "Absent the payment of just compensation, the repeal of a particular security provision impaired an obligation of contract even though the bondholders might have retained other contractual security." *Continental Illinois National Bank, supra*, 696 F.2d at 700.

In this case, the Cities demonstrated, without contradiction, that the 1990 Act, as applied to them by the

PSC, does destroy their ability to place liens on rental premises served and to collect from owners thereof. This constitutes 34.5% of all premises served in Charleston, and 15.7% of all premises served in South Charleston. The Court of Appeals, at the least, should have accorded the Cities a favorable view of this undisputed fact, and recognized that it prevents entry of summary judgment for the PSC.

C. The opinion below erred in finding that a 1989 collection mechanism "replaced" the 1990 repeal of the right to place liens.

The opinion below also went far beyond proper appellate review standards to rule that a legislative enactment in *1989* replaced the ability to place liens on rental properties, which repeal was enacted in 1990. It is illogical to argue that a provision enhancing collection, enacted in 1989, was enacted for the purpose of replacing a security provision deleted one year later, in 1990. Thus, the argument that the landlord lien provision was replaced by a far superior legislated provision is simply false. The water service termination provision as enacted in 1989, the elimination of rental property liens was enacted in 1990.

Again, the Court of Appeals should have given the Cities the benefit of the doubt in viewing their evidence on this point, which was sufficient to withstand summary judgment for the PSC.

CONCLUSION

In characterizing the bond security provisions in *U.S. Trust*, the Supreme Court noted that "The States promised that

revenues and reserves securing the bonds would not be depleted . . . . " 431 U.S. at 25. Here, the State of West Virginia promised municipal sewer revenue bondholders that the Cities shall have a duty to establish rates and charges "to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses" the sewer system, and that "All such rates and charges, if not paid when due, shall constitute a lien upon the premises served by such works." These promises have been substantially impaired. The Court of Appeals should be reversed, and the case remanded for further development.

Respectfully submitted,

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APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

City of Charleston; The
City of South Charleston,
Plaintiffs-Appellees,

v.

Public Service Commission of West Virginia; Boyce Griffith, Chairman; Otis D. Casto, Commissioner; Richard D. Frum, Commissioner,
Defendants-Appellants.

No. 94-2285

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Dennis R. Knapp, Senior District Judge.
(CA-93-161-2)

Argued: March 8, 1995

Decided: June 9, 1995

Before HALL and MOTZ, Circuit Judges, and
WILLIAMS,

United States District Judge for the District of Maryland, sitting by designation.

Reversed and remanded by published opinion. Judge Motz wrote the opinion, in which Judge Hall and Judge Williams joined.

COUNSEL

ARGUED: Richard Edward Hitt, Charleston, West Virginia, for Appellants. James David Kauffelt, KAUFFELT & KAUFFELT, Charleston, West Virginia, for Appellees. **ON BRIEF:** Cathy Culhane, Charleston, West Virginia, for Appellants. T. D. Kauffelt, KAUFFELT & KAUFFELT, Charleston, West Virginia, for Appellees. Carolyn C. Atkinson, City Attorney, CITY OF SOUTH CHARLESTON, South Charleston, West Virginia for Appellees.

OPINION

MOTZ, Circuit Judge:

The district court held that a 1990 West Virginia statute and related orders of the state's Public Service Commission (PSC) impaired contractual obligations contained in sewer bond contracts between two West Virginia cities and their bondholders in violation of the Contract Clause of the United States Constitution,[1] and so

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[1] The Constitution of the United States provides: "No state shall. . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. Art. 1, § 10, cl. 1. The West Virginia Constitution similarly

granted summary judgment to the cities. Because the statute and orders do not constitute a substantial impairment of any contractual right, we reverse and remand.

I.

The West Virginia Legislature has allotted certain authority for the operation of sewer systems to municipalities, *see* W. Va. Code § 16-13-1 *et seq.*, and certain authority for their operation to the PSC. *See* W. Va. Code 24-1-1 *et seq.* The boundaries of the division of that authority have long been a point of contention. *See, e.g., City of Benwood v. Public Service Comm'n,* 83 S.E. 295 (W. Va. 1914). There is no dispute, however, that the cities of Charleston and South Charleston (collectively, the cities) have the authority to issue sewer revenue bonds. *See* W. Va. Code § 16-13-16. Conversely, the cities acknowledge that because they own and operate sewage collection and treatment systems that are public utilities, they are subject to the jurisdiction of the PSC and that the PSC is "empowered by Chapter 24 of the West Virginia Code to regulate the rates, charges, practices and procedures of public utilities."

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provides: "No . . . law impairing the obligation of a contract shall be passed." W.Va. Const. Art 3, § 4. The cities rely on both constitutional provisions, and the district court held both were violated. "In construing [its] state constitutional provisions[s]," the Supreme Court of Appeals of West Virginia has "generally accepted the United States Supreme Court's interpretation of the similar provision contained . . . in the United States Constitution." *Shell v. Metropolitan Life Ins. Co.,* 380 S.E.2d 183, 184 sylb. pt. 1. (W. Va. 1989). Accordingly, we treat the federal and state constitutional claims together.

The present controversy arises from five separate bond series issued by the cities and the contractual obligations contained in the respective bond contracts. Charleston has two outstanding sewer revenue bond issues relevant to this action, both issued in 1989. South Charleston has three relevant outstanding bond issues, issued in 1956, 1961, and 1986, respectively. The bond contracts provide that all rates and charges, if not paid when due, shall be "a lien on the premises served."

Each of the bonds was issued pursuant to a separate bond ordinance. Both Charleston bond ordinances and the 1986 South Charleston bond ordinance provide:

> The City will. . . take all steps, actions, and proceedings for the enforcement and collection of such fees . . . to the full extent permitted or authorized by the laws of the State, and the rules and regulations of the PSC. All such rates and charges, if not paid when due, shall become a lien on the premises served by the System.
>
> The City further covenants and agrees that it will, to the full extent permitted by law, and the rules and regulations promulgated by the PSC, discontinue and shut off the services and facilities of the System . . . .

These ordinances further state that they "shall be deemed to be and shall constitute a contract between the city and such Registered Owners," that the relevant bond "is authorized and issued under and in full compliance with the Constitution and the statutes of the State of West Virginia,

including particularly Article 13 of Chapter 16 of the Code of West Virginia," and that "[a]ll such covenants, agreements and provisions shall be irrevocable, except as provided herein, as long as any of the Bonds or the interest thereon is Outstanding and unpaid." Although the entire text of the bond ordinances and bond contracts is not included in the record, the portions that are included indicate (and the parties do not assert to the contrary) that the remaining two South Charleston bond ordinances and contracts contain similar, although not identical, language.

In addition, the cities maintain that § 16-13-16 of the West Virginia Code "form[ed] a part of these contracts between the Cities and their bondholders, as if written verbatim into the bonds themselves." That statute requires, *inter alia*, that a municipality issuing sewer revenue bonds establish rates "to be paid by the owner" and that those charges "if not paid when due shall constitute a lien upon the premises served." W. Va. Code § 16-13-16. The cities contend that the bond issues "constitute binding contractual obligations to the various purchasers of the bonds" that the cities will use the remedies outlined in the state and local legislation, including the power to impose liens, to collect from delinquent users and so protect the investments of the bond purchasers relating thereto.

In 1989, the West Virginia Legislature amended § 8-18-23 of the West Virginia Code to allow sewer utilities, like the cities, to require utilities providing water service to terminate that service to a user who has failed to pay sewer bills. The statute further provided that "the owner, user, and property shall be held liable at law until such time as all such [sewer] rates and charges are fully paid." A year later, the Legislature again amended § 8-18-23 to provide:

> *[A]n owner* of real property *may not be held liable* for the delinquent rates or

> charges for services or facilities of a tenant, *nor shall any lien attach to real property* for the reason of delinquent rates or charges for services or facilities of a tenant of such real property unless the owner has contracted directly with the municipality to purchase such services or facilities.

(Emphasis added). In other words, after 1990, an owner could not be held personally liable and a lien could not be placed on his property to recover sewer charges owed by delinquent former tenants.

Thus, in the original bond contracts, the cities were empowered, "to the extent permitted" by "the laws of the state and rules and regulations of the PSC," to collect delinquent sewer charges by imposing a lien on "premises served," including those that were leased, even if only the tenant (and not the landlord) was delinquent. However, in the bond contracts, the cities were not empowered to insist that water service provided by a utility other than themselves be shut off if a user was delinquent in paying its sewer bill to the cities. The effect of the 1989 amendment to § 8-18-23 was to grant cities this additional remedy - the right to insist upon the termination of water service to any delinquent sewer user. The effect of the 1990 amendment was to remove the lien remedy as to rental property, i.e., no liens could be placed on an owner's property because a tenant failed to pay a bill.

In March, 1992, the PSC issued two orders ruling that Charleston could not require the termination of water service to landlords because their previous tenants failed to pay sewer charges. *See Copley v. Charleston Sanitary Board*, PSC Case No. 90-518-S-C; *Moore, et al. v. Charleston Sanitary Board*, PSC Case No. 90-120-S-C, *et*

al. The PSC reasoned that § 8-18-23, as amended, allowed termination of water service to delinquent sewer service users, but did not permit termination of water service to a rental property because prior tenants had not paid for sewer service.

In February, 1993, the cities initiated this action against the PSC and its individual members (collectively, the PSC), asserting that the 1990 amendment and the PSC's orders violated their rights under the Contract Clause. Accordingly, the cities asked the district court to declare that the 1990 amendment and the PSC orders constituted an unconstitutional "impairment of the contracts between the Cities and their sewer revenue bond holders." The district court granted summary judgment to the cities, finding that the amended statute constituted a "substantial impairment of the contractual relationship" between the cities and their bondholders, which was not justified by any "significant and legitimate public purpose."

II.

Initially, we consider the standing of the cities to make the claims pursued here. The cities assert that as a result of the 1990 amendment and the PSC's orders they "are suffering increasing delinquent accounts . . . . [which] directly and adversely affect the good financial condition of the cities' sanitary funds" and that "the contractual right granted" to the bond purchasers, which the cities "are contractually bound to protect and vindicate," is "directly and substantially impaired."

Very early in our history, the Supreme Court held that a municipal corporation cannot assert that its "creator" state has violated the Contract Clause by impairing a contract between the municipal corporation and the state which involves governmental powers and functions. *See,*

e.g., City of Covington v. Kentucky, 173 U.S. 231 (1899); *Williamson v. New Jersey,* 130 U.S. 189 (1889); *County Court of Cape Girardeau County v. United States,* 118 U.S. 68 (1886); *Town of East Hartford v. Hartford Bridge Co.,* 51 U.S. 511 (1850); *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819).

In other cases, however, the Court suggested that if a city is performing a "private and proprietary," rather than "public and governmental," function, it might be able to invoke the Contract Clause against its parent state. *See, e.g., City of Worcester v. Worcester Consol. St. Ry.,* 196 U.S. 539, 551 (1905); *Hunter v. City of Pittsburgh,* 207 U.S. 161, 179-80 (1907). *But see City of Covington,* 173 U.S. at 238 (even assuming that city is performing a private function, the Contract Clause afforded it no protection).

The Court soundly rejected this distinction in *City of Trenton v. New Jersey,* 262 U.S. 182, 188 (1923). In *City of Trenton*, the state had granted a private waterworks company the right to take, without any fee, all necessary water from the Delaware River. After the city purchased the waterworks company, the state legislature enacted a statute requiring that every municipality pay a fee for water, in excess of a certain amount, taken from the river. The Supreme Court acknowledged that in prior cases it had suggested a possible distinction between contracts involving property owned by cities in their governmental capacity and those involving property owned by them in their proprietary capacity, but pointed out that in none of those cases was any right of a city held to be protected by the Contract Clause. The Court then dismissed the case before it for lack of jurisdiction, reasoning:

> [S]uch distinction [between governmental and proprietary functions] furnishes no

> ground for the application of constitutional restraints here sought to be invoked by the City of Trenton against the State of New Jersey. They do not apply as against the State in favor of its own municipalities. We hold that the City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question . . . .

262 U.S. at 191-92; *see also Risty v. Chicago R.I. & P. Ry. Co.*, 270 U.S. 378, 390 (1926). Thus, it now seems settled, absent clear state law to the contrary,[2] that a city cannot assert that its creator state has violated the Contract Clause by impairing a contract *between the city and the state itself. See, e.g., Appling County v. Municipal Elec. Authority*, 621 F.2d 1301, 1308 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980); *Town of Charleston, R.I. v. United States*, 696 F. Supp. 800, 806-07 (D.R.I. 1988), *aff'd*, 873 F.2d 1433 (1st Cir. 1989).

There is also some support for the conclusion that a municipality has no standing to bring *any* suit based on the Contract Clause (or any other part of the Constitution) against the state that created it. In *Williams v. Mayor &*

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[2] The West Virginia courts have never directly addressed the question of whether a municipality has rights protected by the Contract Clause against subsequent impairment by its creator state. *Compare City of Boston v. Jackson*, 260 U.S. 309, 316 (1922), and *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394 (1919). In early cases, they did entertain Contract Clause claims brought by municipalities against the State, but in those cases they did not consider the cities' standing to assert such a claim or even hold that there was a Contract Clause violation. *See, e.g., City of Charleston v. Public Service Comm'n*, 103 S.E. 673 (W. Va. 1920); *City of Benwood*, 83 S.E. at 208.

City Council of Baltimore, 289 U.S. 36, 40 (1933), the Court expansively asserted:

> A municipal corporation, created by a state for the better ordering of government, *has no privileges and immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.*

(Emphasis added.) *Williams* has been followed largely in Fourteenth Amendment cases. *See Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n.1 (5th Cir. 1984); *Village of Arlington Heights v. Regional Transp. Authority*, 653 F.2d 1149, 1151-53 (7th Cir. 1981); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233-34 (9th Cir.,), *cert. denied*, 449 U.S. 1039 (1980); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973); *see also* Paul M. Bator *et al.*, Hart & Wechsler's *The Federal Courts and the Federal System* 182 (2d ed. 1973) ("Municipal corporations have regularly been denied standing in the federal courts to attack state legislation as violative of the federal Constitution, on the ground that they have no rights against the state of which they are a creature."). But, in *Coleman v. Miller*, the Court expressly indicated that this principle was also applicable in the context of a Contract Clause claim:

> Being but creatures of the State, *municipal corporations have no standing to invoke the contract clause* or the provisions of the Fourteenth Amendment of the Constitution in *opposition to the will of their creator.*

307 U.S. 433, 441 (1939) (emphasis added) (dictum).

The *Coleman* statement was, however, only dictum, and we have been unable to find a single federal case *holding* that a city cannot sue its parent state for impairing a contract between the city and a third party,[3] let alone one so holding when the city has a contractual obligation to protect the third party's rights under the contract.[4] Furthermore, in suits by creditors of a city or town, it has long been recognized that even though a municipality is just a creature of the state, a state cannot, consistent with the Contract Clause, abolish the municipality without preserving to its creditors some effective means to collect the debts owed to them. *See Graham v. Folsom*, 200 U.S. 248, 253-54 (1906); *Town of Mount Pleasant v. Beckwith*, 100 U.S. 514 (1879).

Moreover, doubts have been expressed as to whether the "broad dicta" that "a political subdivision may never sue its maker on constitutional grounds" is really "the rule." *See San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1309 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *see also City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S.

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[3] In fact, *St. Cloud Public Service Co. v. City of St. Cloud*, 265 U.S. 352 (1924), and *Superior Light & Power Co. v. City of Superior*, 263 U.S. 125 (1923), implicitly support the cities' standing in the present case, as do – notwithstanding *City of Trenton v. New Jersey - City of Worcester v. Worcester Consol. St. Ry.*, 196 U.S. 539 (1905), and *City of New Orelans v. New Orleans Water Works Co., 142 U.S. 79 (1891).*

[4] One of the very few cases in which a city attempted to assert, on behalf of third parties, that the state had impaired a contract between the city and third parties is *Hunter v. City of Pittsburgh*, 207 U.S. at 179-80. There the city claimed that a state statute requiring consolidation of two cities impaired an asserted contract between the city and its citizens that they would only be taxed for the obligations of a particular city. The Supreme Court rejected the claim, not because the city lacked standing to bring it, but because the Court held no such contract existed between the city and its citizens.

1039, 1042 (1980) (White & Marshall, JJ., dissenting from denial of certiorari) ("Such a per se rule is inconsistent with [*Board of Educ. v.*] *Allen* [, 392 U.S. 236 (1968)]"); *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960); *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500, 504-06 (6th Cir. 1986); *Rogers v. Brockette*, 588 F.2d 1057, 1067-71 (5th Cir.), *cert. denied*, 444 U.S. 827 (1929).

Thus, whether the cities have standing to bring this suit is unclear. In this case we need not resolve this troublesome question because even if the cities have standing to maintain this action, their claim clearly fails on the merits.[5] Accordingly, we assume - without deciding - that the cities have standing to assert the Contract Clause claim made here and address the merits of that claim.

III.

The Contract Clause mandates: "No state shall . . . pass . . . any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. Art. I, § 10, cl. 1. The Supreme Court, however, has long held that this seemingly absolute prohibition is not absolute at all. *See, e.g., Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 240 (1978); *United States Trust Co. v. New*

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[5] Standing, of course, is usually a threshold inquiry. However, the Supreme Court has recognized the propriety of avoiding difficult standing questions when, as here, even assuming a party has standing, it "has not made a case" for the relief sought. *See Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 86, 89 (1970); *see also Secretary of Navy v. Avrech*, 418 U.S. 676, 678-79 (1974); *United States v. Augenblick*, 393 U.S. 348, 351-52 (1969).

Jersey, 431 U.S. 1, 21 (1977); *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 434 (1934).

Instead, the Court has developed a "three-part analysis for harmonizing the command of the clause with" those powers "necessarily reserved" to the states "to provide for the welfare of their citizens." *Baltimore Teachers Union v. Mayor and City Council of Baltimore,* 6 F.3d 1012, 1015 (4th Cir. 1993) (quoting *United States Trust,* 431 U.S. at 21*), cert. denied,* ____ U.S. ____, 114 S. Ct. 1127 (1994). Initially, a court must determine whether state law has, in fact, impaired any contract; if so, it must then determine if the contract was "substantially impaired;" if the state law is found to constitute a substantial impairment of the contract, a court must determine "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers."[6] *Id.; Spannaus,* 438 U.S. at 244; *United States Trust,* 431 U.S. at 17. Only if there is a contract, which has been substantially impaired, and there is no legitimate public purpose justifying the impairment, is there a violation of the Contract Clause.

A.

In the present case, the district court gave no consideration to the threshold inquiry of "whether there is a contractual relationship, [and] whether a change in law impairs that contractual relationship . . . ." *General Motors v. Romein,* ____ U.S. ____, 112 S. Ct. 1105, 1109 (1992). It is worth some analysis. Although the cities clearly entered into bond contracts with their bondholders,

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[6] As part of this third step, a court must determine if the impairment is "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust,* 431 U.S. at 22.

the nature and extent of those contracts and whether they were impaired by the 1990 amendment are not at all clear.

At the time the bonds were issued, the Legislature authorized the cities "to insure revenue bonds," W. Va. Code § 16-13-1; "to make and enter into all contracts and agreements necessary or incidental to the performance of [their] duties and the execution of [their] powers under this article," W. Va. Code § 16-13-3; and to establish rates to "be paid by the owner," which "if not paid when due [would] constitute a lien upon the premises served." W. Va. Code § 16-13-16.[7] The cities entered into bond contracts covenanting to "diligently enforce and collect all fees." Those contracts provide that charges "not paid when due shall become a lien on the premises." On the other hand, the cities covenanted only to enforce and collect charges "to the full extent permitted or authorized by the laws of the State, and the rules and regulations of the PSC."

In a somewhat similar case, the West Virginia Supreme Court of Appeals, after examining the city's charter, rejected the city's contention that rate increases ordered by the PSC impaired "binding contracts" between the city and the private water company "regulating" the water company's "charges or activities" in violation of the Contract Clause because no "portion of the charter clear[ly] grant[ed] . . . [the city] authority" to enter into such

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[7] The PSC concluded that cities (like Charleston and South Charleston) which provide only sewer service are not covered by § 16-13-16, which applies to municipalities that provide both water and sewer service. The district court implicitly rejected this interpretation of § 16-13-16. For the purposes of this appeal, we will assume without deciding that the district court was correct and that § 16-13-16 is applicable to the cities. *See Delardas v. Morgantown Water Comm'n*, 137 S.E.2d 426, 431 (W. Va. 1964); *State v. Renick*, 116 S.E.2d 763 (W. Va. 1960).

"binding contracts." *City of Charleston,* 103 S.E. at 674-75 (citations omitted). The court explained:

> [T]he authority of the municipality so to restrict and limit the power of the state "must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power." The intent to confer upon a municipality the power to make an inviolable contract of this nature cannot be implied.

Id.; see also City of Benwood, 83 S.E. at 297-98. Moreover, under West Virginia law:

> [A]ll contracts made by a utility relating to the public service must be deemed to be entered into in contemplation of the exercise by the state of its regulatory power whenever the public interest may make it necessary . . . although an otherwise valid contract is binding on the parties to it until a departure from such contract has been directed by competent authority.

Preston County Light & Power Co. v. Renick, 113 S.E.2d 378, 387 (W. Va. 1960); *see also United Fuel Gas Co. v. Battle,* 167 S.E.2d 890, 904 (W. Va.), *cert. denied,* 396 U.S. 116 (1969).

In view of the rigorous standards developed by the West Virginia courts and the fact that the bond contracts expressly state that the cities' enforcement authority is limited to that "authorized by the laws of the state, and the rules and regulations of the PSC," it well may be that the bond contracts at issue here were not impaired at all. As

Justice Holmes noted: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *see also United States Trust*, 431 U.S. at 22; *Bannum, Inc. v. Town of Ashland*, 922 F.2d 197, 202-03 (4th Cir. 1990).

B.

Even if the bond contracts were impaired by the 1990 amendment, however, there would be no Contract Clause violation unless that impairment was substantial. The district court concluded that there had "indeed been a substantial impairment" because:

> Although the plaintiffs are able to meet their bond obligations at present,[8] they may not be able to do so in the future. Thus, whether the plaintiffs are able to pay bondholders is not the critical issue here. The plaintiffs had explicit contractual agreements with their bondholders to place liens on "premises served" when bills are not paid. The statutory amendment obliterating this agreement is a substantial impairment of it.

This summary analysis may be due to the fact that, as we noted in *Baltimore Teachers Union*, the "Supreme Court has provided little specific guidance as to what constitutes a 'substantial' contract impairment." 6 F.3d at

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[8] There was uncontradicted evidence that both cities maintained balances in their reserve accounts more than sufficient to cover the principal and interest due on the bonds.

1017. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves,* 459 U.S. at 41. It is established, however, that a finding of "technical impairment" is insufficient, i.e., such a finding is merely "a preliminary step in resolving the more difficult question of whether that impairment is permitted under the Constitution." *United States Trust,* 431 U.S. at 21.

In determining whether an impairment is substantial and so not "permitted under the Constitution," of greatest concern appears to be the contracting parties' actual reliance on the abridged contractual term. Specifically, the Supreme Court has examined contracts to determine whether the abridged right is one that was "reasonably relied" on by the complaining party, *Spannaus,* 438 U.S. at 246, or one that "substantially induced" that party "to enter into the contract." *City of El Paso v. Simmons,* 379 U.S. 497, 514 (1965); *see also United States Trust,* 431 U.S. at 20 n.17. *See generally Baltimore Teachers Union,* 6 F.3d at 1017-18 and n.7. When assessing whether there has been the requisite reliance, the Court has looked to objective evidence of reliance.[9]

For example, the Court has examined the terms of the original contract to determine whether the contract - either explicitly or implicitly - indicated that the abridged

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[9] This is one of the reasons why the cities' reliance on the affidavit of an officer of a bondholder that his organization "expected to receive, and did in fact receive, the covenants and promises of [the cities] to place and enforce liens for unpaid sewer charges upon all premises served by the cities' sewer systems" is misplaced. The officer's affidavit does not state that his organization actually relied on or was induced by the lien provision in purchasing the bonds, let alone that the provision was central or important to its purchase of the bonds; indeed, the affidavit does not even indicate that the officer has personal knowledge as to his organization's general "expectations."

term was subject to impairment by the legislature. *See Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 130 n.6 (1937). Here, as noted above, the cities covenanted to collect charges for sewer service "to the full extent *permitted or authorized by the laws and the State, and the rules and regulations of the PSC*" (emphasis added). Accordingly, in the bond contracts it was expressly acknowledged that the cities' obligations to collect sewer charges and the bondholders' rights to have the cities collect these charges were subject to legislative authorization and regulation.

The Supreme Court has also directed that in assessing the parties' expectations, and so "determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves,* 459 U.S. at 411; *Spannaus*, 438 U.S. at 242 n.13. "[P]ervasiveness of . . . prior regulation . . . suggests that absent some affirmative indication to the contrary the [complaining party] had no legitimate expectation that regulation would cease . . . ." *National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 469 (1985). The authority of the PSC to regulate the rates and practices of West Virginia municipalities, when acting as utilities, has existed at least since 1914. *See City of Benwood*, 83 S.E. at 296. The specific power of the PSC to regulate the extension, *Renick*, 116 S.E.2d at 770, and termination, *Chesapeake & Potomac Tel. Co. v. City of Morgantown,* 107 S.E.2d 489, 497 (W. Va. 1959), of service by a public utility to its customers is also well established. Thus, PSC regulation was "pervasive" and there was no reason for the cities and their bondholders to believe regulation would cease.[10]

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[10] In this regard, the cities' assertion that "[t]he PSC has never regulated the terms or enforcement of municipal bond covenants"

The Court has also examined *how* a contract has been changed, i.e., whether a covenant was abolished or "merely modified." *United States Trust*, 431 U.S. at 19. In *United States Trust*, an amendment to state law "totally eliminated" the state's prior promise that Port Authority revenues would be pledged to pay bondholders and, except for specified instances, not applied to future deficits of railway facilities, and so was found to constitute a substantial impairment. *Id.* The Court noted, however, that "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *Id.* at 19 n.17. The 1990 amendment to § 8-18-23 only modifies the cities' right to impose liens on premises served, limiting that right to premises owned by the actual delinquent owners. The undisputed evidence before the district court on summary judgment was that the majority of sewer accounts in both cities involved owner-occupied premises (84% in South Charleston and 65% in Charleston). The challenged 1990 amendment would, of course, have no effect on collection efforts with regard to these accounts.

Finally, in determining the parties' reliance, the cases have focused on the character of the abridged right - whether it was by its nature "the central undertaking" or "primary consideration" of the parties. *City of El Paso*, 379 U.S. at 514. Thus, elimination of escalator clauses in natural gas contracts, *Energy Reserves*, 459 U.S. at 415-16; lowering the interest rate and delaying the maturity date

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misconceives the nature of the regulation in the present case. Neither the 1990 amendment nor the PSC's orders applying it are directed to altering the terms or remedies of bond contracts. Instead, they impose a generally applicable state policy, concerning when liens can be placed on properties and when services can be terminated or denied.

in bond contracts, *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 504 (1942); and elimination of the unlimited right to reinstate ownership of land after default, *City of El Paso*, 379 U.S. at 515, have been held not to constitute substantial impairments of contract rights, in part because the rights abridged were not in their nature essential to the underlying contract. In contrast, statutes causing "a fundamental change" in a pension contract, *Spannaus*, 438 U.S. at 246; repealing a statutory covenant, the purpose of which "was to invoke the constitutional protection of the Contract Clause as security against repeal," *United States Trust*, 431 U.S. at 18; and unilaterally modifying a contract right upon which the parties "especially" relied, i.e., "the right to compensation at the contractually specified level" in a public employment contract, *Baltimore Teachers Union*, 6 F.3d at 1018, have been held substantial impairments because the rights impaired by subsequent legislation were "important," *U.S. Trust*, 431 U.S. at 19, "basic," *Spannaus*, 438 U.S. at 246, and "central," *Baltimore Teachers Union*, 6 F.3d at 101, to the underlying contract. The modification of the bond contracts here so that one remedy - the right to impose liens - was removed as to one relatively small group simply does not constitute a right similarly "important," "basic," or "central." Like the Court in *City of El Paso*, "[w]e do not believe it can seriously be contended that the [bondholders were] substantially induced to enter these contracts" on the basis of the right abridged by subsequent legislative amendment. *City of El Paso*, 379 U.S. at 514.

To recapitulate, in determining the parties' expectations and actual reliance on the abridged contractual term, the Supreme Court has looked to several objective factors. Here each of these factors indicate that the 1990 amendment did not constitute a substantial impairment of the bond contracts. The bond contracts themselves contain express acknowledgments that the parties' rights were

subject to legislative regulation; there was a long established precedent of extensive state regulation of public utilities; the contracts were not abolished but merely modified; and the abridged right is, by its nature, not one central to the parties' undertaking.

Moreover, there is one further indication that the alleged impairment was not substantial. In addition to assessing the parties' expectations and actual reliance on the abridged contractual term, the Supreme Court has also directed that, in determining whether there has been a substantial impairment, a court should determine whether the abridged right was "replaced by an arguably comparable security provision." *United States Trust,* 431 U.S. at 19. This is so because "[t]he particular remedy existing at the date of contract may be altogether abrogated if another equally effective for the enforcement of the obligations remains or is substituted for the one taken away." *Richmond Mortgage & Loan Corp.,* 300 U.S. at 128-129. "The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static." *United States Trust,* 431 U.S. at 21 n.17. In *United States Trust,* upon which the cities so heavily rely, no substitute security - of any kind - had been afforded the bondholders.

In contrast, the PSC argues that in this case "the Legislature in 1989, provided the utilities with a far more effective remedy to insure the payment of sewer bills by providing that customers' water service can be terminated for failure to pay such bills," and that the district court erred in failing to "consider the impact of the substituted remedy." In support of this claim, the PSC submitted uncontroverted evidence that after enactment of the 1989 amendment permitting the cities to require termination of water service to those with delinquent sewer bills,

Charleston's revenues from sewer service increased 4.7% and its accounts receivable decreased 44.7%, and South Charleston's revenues increased 29.3%, and its accounts receivable decreased 4.2%.

The cities contend that it was proper for the district court to ignore the effect of this new remedy because "[t]he water service termination provision [w]as enacted in 1989, [and] the elimination of rental property liens was enacted in 1990," and so, they claim, the former cannot be regarded as a replacement for the latter. We cannot agree. The Supreme court has never suggested that the comparable remedy must be enacted *at the same time* that the original remedy is modified. The critical date is that on which the contracts were entered into. The cities do not claim that when they entered into the bond contract they had the power to have water service terminated to delinquent sewer bill customers; they now have that power. Thus, although their enforcement power has been modified by the 1990 amendment, the cities have been supplied with another effective security provision in the 1989 amendment. Indeed, there was ample uncontroverted evidence that the 1989 termination provision is a far more effective collection remedy than the lien on rental property that was eliminated in 1990.

IV

In sum, assuming the cities have standing to pursue their Contract Clause claim, if the bond contracts were impaired at all by the 1990 amendment to W. Va. Code § 8-18-23, that impairment was clearly insubstantial. There was no violation of the Contract Clause.[11] Accordingly, the judgment of the district court is reversed, and the case

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[11] In view of our decision as to the Contract Clause claim, we need not reach the PSC's alternative arguments.

is remanded for entry of summary judgment in favor of the Public Service Commission of West Virginia.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

THE CITY OF CHARLESTON, and
THE CITY OF SOUTH CHARLESTON,

Plaintiffs,

v. Civil Action No. 2:93-0161

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA; BOYCE GRIFFITH,
Chairman; OTIS D. CASTO, Commissioner;
and RICHARD D. FRUM, Commissioner,

Defendants.

MEMORANDUM OPINION

The plaintiffs in this case contend that a 1990 statutory amendment eliminating landlord liens for nonpayment of sewer bills and certain orders of the defendants implementing the amended statute violate the Contract Clause of the United States Constitution. Both parties have filed motions for summary judgment with supporting memoranda and the Sanitary Board of Bluefield

has, at the leave of the court, filed an amicus curiae brief in support of the plaintiffs' motion.

I.

Under authority granted to them by Chapter 16, Article 13 of the West Virginia Code, the plaintiffs in this case have issued, and currently have outstanding, certain sewer revenue bonds. The various sewer revenue bonds "constitute binding contractual obligations of the Cities to the various purchasers of the bonds, granting to those purchasers security interests for the protection of their investments, and certain rights and remedies relating thereto." (Complaint, ¶ 13.) Under West Virginia law, the provisions of Chapter 16, Article 13 form a part of the sewer revenue bond contracts, as if written verbatim into the bonds.[12] Brewer v. City of Point Pleasant, 114 W.Va. 572, 172 S.E. 717 (1934). Thus, included in the various bond contracts is a provision of W. Va. Code, 16-13-6 which provides in part that "[a]ll such rates or charges, if not paid when due, shall constitute a lien upon the premises served by such works. . . ." Accordingly, under this statutory provision liens could be placed on property due to delinquent sewer bills incurred by tenants of rental property.

In 1989, W. Va. Code, 8-18-23, the statute dealing with nonpayment and delinquency of sewer service charges, was amended to allow sewer utilities to insist upon the termination of water service provided by a utility other

[12] Article 13 of Chapter 16 of the West Virginia Code is entitled "Sewage Works of Municipal Corporations and Sanitary Districts."

than the sewer utility to customers with a delinquent sewer bill. Then effective June 9, 1990, W. Va. Code, 8-18-23 was amended as follows:

> Provided, That an owner of real property may not be held liable for the delinquent rates or charges for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for services or facilities of the tenant of such real property, unless the owner has contracted directly with the municipality to purchase such services or facilities.[13]

In Count I of their complaint, the plaintiffs allege that the 1990 amendment eliminating liens against landlords and two orders of the Public Service Commission (hereinafter "PSC") applying the statutory amendment[14]

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[13] Prior to the 1990 amendment, W. Va. Code, 18-8-23 read: (b) Whenever any rates and charges for services or facilities furnished remain unpaid for a period of thirty days after the same become due and payable, the property and the owner thereof, as well as the user of the services . . . shall be delinquent and the owner, user and property shall be held liable at law . . . . (c) All rates and charges whenever delinquent, as provided by ordinance of the municipality, shall be liens . . . upon the real property served, and the municipality shall have plenary power and authority from time to time to enforce such lien in a civil action to recover the money due . . . ."

[14] The Public Service Commission orders in question are the Copley order and the Moore order, both entered on March 30, 1992. Those orders involved ten different complaint cases filed at the PSC by landlords and tenants against the Sanitary Board of the City of Charleston. In those orders, the PSC held that the 1990 amendment ended property owner responsibility unless the owner contracted directly for the service.

violate the Contract Clause, U. S. Const., Art. I, § 10, cl. 1.[15] Specifically, the plaintiffs allege that as a result of the amendment and the Moore and Copley orders, "the ability of the Cities to meet their obligations under their sewer revenue bonds has been directly and severely impaired, and the security of bondholders has been lessened." (Complaint, Count I, ¶ 35.) The plaintiffs also allege that the actions of the Public Service Commission are in violation of 42 U.S.C. § 1983 (Complaint, Count II, ¶ 45), and that the actions of the defendants constitute an impairment of contract in violation of Article III, Section 4 of the West Virginia Constitution which provides in part that "No . . . law impairing the obligation of a contract, shall be passed." (Complaint, Count III, ¶ 50.) The plaintiffs allege that the 1990 amendment to W. Va. Code, 8-18-23 and the Moore and Copley orders "constitute an impairment of the contracts between the Cities and their sewer revenue bondholders."

The plaintiffs seek declaratory relief as well as injunctive relief prohibiting the defendants from interfering in the placement of liens for unpaid sewer service bills on property occupied by renters, and attorney's fees and costs.

II.

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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[15] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party for summary judgment has the burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). However, once a moving party has met its initial burden, the burden shifts to the non-moving party to "establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). To meet this burden, the non-moving party cannot rely on its pleadings, but instead must proffer evidence showing there is a genuine issue for trial. In order to create a triable issue there must be sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If there is not, then summary judgment should issue.

III.

"Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983), quoting Home Bldg. & Loan Ass. v. Blaisdell, 290 U.S. 398 (1934).

In Energy Reserves, the Court set out the appropriate Contract Clause standard. "The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978). "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." Id. at 17.

If the court finds that there has been a substantial impairment, the State must have a significant and legitimate public purpose behind the law to justify it, United States Trust Co., 431 U.S. at 22, such as the remedying of a broad and general social or economic problem.[16] Once a legitimate public purpose has been identified, the inquiry becomes whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. Id. at 22.

In support of their argument that the amended statute impairs their contracts with their bondholders, the plaintiffs rely on United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), in which the Court held that New Jersey could not retroactively alter a statutory bond covenant.

In this case, the court finds that there has indeed been a substantial impairment of the contractual relationship between the plaintiffs and their bondholders. Specific provisions of bond ordinances attached to the complaint show that provisions relating to the placement of

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[16] As the Court stated in Energy Reserves, the requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. 459 U.S. at 412.

liens on property for delinquent sewer bills are present in all of the ordinances. These provisions have, in effect, been repealed by the 1990 amendment to W. Va. Code, 8-18-23. Although the defendants have presented evidence that the elimination of landlord liens has had no negative impact upon the plaintiffs' revenues and their obligations as set forth in the bond agreements,[17] the Contract Clause speaks of the impairment of the "obligation of a contract" not the impairment of the performance of a contract. Although the plaintiffs are able to meet their bond obligations at present, they may not be able to do so in the future. Thus, whether the plaintiffs are able to pay bondholders is not the critical issue here. The plaintiffs had explicit contractual agreements with their bondholders to place liens on "premises served" when bills are not paid. The statutory amendment obliterating this agreement is a substantial impairment of it.

Having found a substantial impairment, the court must now determine whether the State has a significant and legitimate public purpose behind the law to justify it such as the remedying of a broad and general social or economic problem. The answer to this question is clear: there is no legitimate public purpose behind the elimination of the liens against landlords. The amendment was simply a piece of special interest legislation introduced on behalf of landlords for the benefit of the landlords. (See Deposition of George Farley, pp. 8-10.) The lien provisions relating to owner-occupied premises remained in effect, as did the provisions

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[17] The City of Charleston is required to have debt coverage of 110% and has debt coverage of 136.46%. The City of South Charleston is required to have debt coverage of 115% and has debt coverage of 133.12%. (Affidavit of Birdie Gandy.)

relating to premises served by public service district sewer systems.

Having found a substantial impairment of the plaintiffs' contracts with their bondholders and having found that no legitimate public purpose is served by the 1990 statutory amendment, the court need not proceed further in its analysis of the Contract Clause issue.

Plaintiffs further assert that the defendants, by their actions, have violated 42 U.S.C. § 1983, which in pertinent part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Defendants counter that the allegations of plaintiffs herein do not fall within the scope of § 1983.

The issue thus raised involves a determination of the scope and purpose of § 1983. It is pertinent to note that it is to be broadly and liberally construed.

The Court is of the opinion that the defendants herein are in violation of § 1983 in view of the obvious purpose of the statutory enactment. The acts of defendants fit squarely within the prohibitions imposed by § 1983. As the Supreme Court of the United States observed in Dennis v. Higgins, a broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "any rights, privileges or immunities secured by the Constitution and laws." See, Dennis v. Higgins, 498 U.S. 439.

Having fully considered the issues raised by the pleading, the memoranda of the parties in support of their motions and the argument of counsel, the Court is of the opinion to grant plaintiffs' motion for summary judgment and it is so ORDERED.

The Clerk is directed to mail copies of this Memorandum Opinion to counsel of record herein.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

THE CITY OF CHARLESTON, and
THE CITY OF SOUTH CHARLESTON,

Plaintiffs,

v. Civil Action No. 2:93-0161

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA; BOYCE GRIFFITH,
Chairman; OTIS D. CASTO, Commissioner;
and RICHARD D. FRUM, Commissioner,

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum Opinion of the Court filed herein, the Court finds and declares that:

1. The 1990 amendment to W. Va. Code § 8-18-23 constitutes an unconstitutional impairment of the obligations of the contracts between the Cities and their sewer revenue bondholders, in violation of Article I,

Section 10, Clause 1 of the Constitution of the United States;

2. The Public Service Commission's Orders in the Copley and Moore cases, attached to the Complaint as Exhibits F and G, interpreting and applying the amendment to W. Va. Code § 8-18-23, likewise unconstitutionally impair the contractual obligations of the Cities to their sewer revenue bondholders, in violation of Article I, Section 10, Clause 1 of the Constitution of the United States, and are, therefore, to the extent that they so rule, null and void;

3. The Public Service Commission of West Virginia may not prohibit or otherwise interfere with the efforts of the Cities to collect delinquent sewer charges from landlords for sewer service provided to their rental properties, including, but not limited to, placing statutory liens on such property;

4. The 1990 amendment to W. Va. Code § 8-18-23, and the Public Service Commission's Orders in Copley and Moore, constitute an unconstitutional impairment of the contracts between the Cities and their sewer revenue bondholders in violation of Article III, Section 4 of the Constitution of West Virginia;

5. The 1990 amendment to W. Va. Code § 8-18-23, and the Commission's rulings in Copley and Moore, deprive the Cities of rights, privileges and immunities secured to them by 42 U.S.C. § 1983;

6. And further, all defendants are enjoined and prohibited from any and all further interference with other lawful efforts of the Cities to collect such bills.

All matters herein having been concluded, it is hereby ORDERED that this civil action be dismissed from the docket of the Court.

The Clerk is directed to mail copies of this Judgment Order to counsel of record herein.

APPENDIX D

WEST VIRGINIA CODE

§ 8-18-23. Authority to require discontinuance of water service by provider utility for nonpayment of sewer service rates and charges; lien for delinquent service rates and charges; failure to cure delinquency; civil actions; deferral of filing fees and costs in magistrate court action; limitations with respect to foreclosure.

(a) When any municipality owns, maintains, operates or provides sewer facilities to its residents and customers and does not own, maintain, operate or provide water facilities to them when the same is provided by any other publicly or privately owned utility, municipality or public service district, the municipality providing sewer facilities may require the provider of water facilities to discontinue water service to any of its users who are delinquent in the payment of sewer service rates and charges to the municipality. The provider of water facilities is empowered and authorized hereby to discontinue water service upon demand of the municipality for this purpose; however, prior to discontinuance of any water service, the municipality shall contract with the provider of water facilities which contract shall provide that the municipality shall reimburse the provider of water facilities for all costs and expenses incurred in both the termination of water service to the delinquent user of sewer facilities and the subsequent resumption of water service to

such user. The contract shall provide for reasonable methods and assurances so that the provider of water facilities will be protected and held harmless from claims and damages when water service is discontinued in error or in violation of the rights of the user through the fault of the municipality providing sewer facilities and making the demand for discontinuance of water service to the user of such sewer facilities. Any contract made for this purpose shall have the approval of the public service commission prior to its execution and performance. Any disconnection of water service must comply with all rules, regulations and orders of the public service commission.

(b) Whenever any rates and charges for services or facilities furnished remain unpaid for a period of thirty days after the same become due and payable, the user of the services and facilities provided shall be delinquent and the user shall be held liable at law until such time as all such rates and charges are fully paid.

(c) All rates and charges whenever delinquent, as provided by ordinance of the municipality, shall, when notice thereof is duly recorded in the office of the clerk of the county commission wherein the subject real property is situate, be liens of equal dignity, rank and priority with the lien on such premises of state, county, school and municipal taxes for the amount thereof upon the real property served, and the municipality shall have plenary power and authority from time to time to enforce such lien in a civil action to recover the money due for such services rendered plus court fees and costs and a reasonable attorney's fee: Provided, That an owner of real property may not be held liable for the delinquent rates or charges

for services or facilities of a tenant, nor shall any lien attach to real property for the reason of delinquent rates or charges for services or facilities of a tenant of such real property, unless the owner has contracted directly with the municipality to purchase such services or facilities.

(d) Municipalities are hereby granted a deferral of filing fees or other fees and costs incidental to the bringing and maintenance of an action in magistrate court for the collection of the delinquent rates and charges. If the municipality collects the delinquent account, plus fees and costs, from its customer or other responsible party, the municipality shall pay to the magistrate court the filing fees or other fees and costs which were previously deferred.

(e) No municipality may foreclose upon the premises served by it for delinquent rates and charges for which a lien is authorized by this section except through the bringing and maintenance of a civil action for such purpose brought in the circuit court of the county wherein the municipality lies. In every such action, the court shall be required to make a finding based upon the evidence and the facts presented that the municipality had exhausted all other remedies for the collection of debts with respect to such delinquencies prior to the bringing of such action. In no event shall foreclosure procedures be instituted by any municipality or on its behalf unless such delinquency has been in existence or continued for a period of two years from the date of the first such delinquency for which foreclosure is being instituted. (1989, c. 133; 1990, c. 140.)

WEST VIRGINIA CODE

§ 16-13-16. Rates for service; change or readjustment; hearing; lien and recovery; discontinuance of services.

The governing body shall have power, and it shall be its duty, by ordinance, to establish and maintain just and equitable rates or charges for the use of and the service rendered by such works, to be paid by the owner of each and every lot, parcel of real estate or building that is connected with and uses such works by or through any part of the sewerage system of the municipality, or that in any way uses or is served by such works, and may change and readjust such rates or charges from time to time. Such rates or charges shall be sufficient in each year for the payment of the proper and reasonable expense of operation, repair, replacements and maintenance of the works and for the payment of the sums herein required to be paid into the sinking fund. Revenues collected pursuant to this section shall be deemed the revenues of the works. No such rates or charges shall be established until after a public hearing, at which all the users of the works and owners of property served or to be served thereby and others interested shall have an opportunity to be heard concerning the proposed rates or charges. After introduction of the ordinance fixing such rates or charges, and before the same is finally enacted, notice of such hearing, setting forth the proposed schedule of such rates or charges, shall be given by publication as a Class II-O legal advertisement in

compliance with the provisions of article three [§ 59-3-1 et seq.], chapter fifty-nine of this Code, and the publication area for such publication shall be the municipality. The first publication shall be made at least ten days before the date fixed in such notice for the hearing. After such hearing, which may be adjourned from time to time, the ordinance establishing rates or charges, either as originally introduced or as modified and amended, shall be passed and put into effect. A copy of the schedule of such rates and charges so established shall be kept on file in the office of the board having charge of the operation of such works, and also in the office of the clerk of the municipality, and shall be open to inspection by all parties interested. The rates or charges so established for any class of users or property served shall be extended to cover any additional premises thereafter served which fall within the same class, without the necessity of any hearing or notice. Any change or readjustment of such rates or charges may be made in the same manner as such rates or charges were originally established as hereinbefore provided: Provided, however, That if such change or readjustment be made substantially pro rata, as to all classes of service, no hearing or notice shall be required. The aggregate of the rates or charges shall always be sufficient for such expense of operation, repair and maintenance and for such sinking fund payments. All such rates or charges, if not paid when due, shall constitute a lien upon the premises served by such works. If any service rate or charge so established shall not be paid within thirty days after the same is due, the amount thereof, together with a penalty of ten percent, and a reasonable attorney's fee, may be recovered by the board in a civil action in the name of the municipality, and in connection with such action said lien may be foreclosed

against such lot, parcel of land or building, in accordance with the laws relating thereto: Provided, however, That where both water and sewer services are furnished by any municipality to any premises the schedule of charges may be billed as a single amount or individually itemized and billed for the aggregate thereof. Whenever any rates, rentals or charges for services or facilities furnished shall remain unpaid for a period of thirty days after same shall become due and payable, the property and the owner thereof, as well as the user of the services and facilities shall be delinquent until such time as all such rates and charges are fully paid. The board collecting such charges shall be obligated under reasonable rules and regulations, to shut off and discontinue both water and sewer services to all delinquent users of either water facilities, or sewer facilities, or both, and shall not restore either water facilities or sewer facilities to any delinquent user of either until all delinquent charges for both water facilities and sewer facilities, including reasonable interest and penalty charges, have been paid in full. (1933, Ex. Sess., c. 25, § 16; 1933, 2nd Ex. Sess., c. 48; 1959, c. 125; 1967, c. 105.)

APPENDIX F

AFFIDAVIT OF DANIEL B. YONKOSKY

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Daniel B. Yonkosky, being first duly sworn, deposes and says as follows:

1. That he is the Director of the West Virginia Water Development Authority, an agency of the State of West Virginia;

2. That the West Virginia Water Development Authority is the owner of certain sewer revenue bonds issued by the City of Charleston in March 1989, and in November 1989;

3. That the West Virginia Water Development Authority is the owner of certain sewer revenue bonds issued by the City of South Charleston in August 1986;

4. That, as part of the security for repayment of the money loaned to Charleston and South Charleston (hereinafter the "Cities") pursuant to the bonds mentioned in Paragraphs 2 and 3 of this Affidavit, the West Virginia Water Development Authority expected to receive, and did in fact receive, the covenants and promises of Charleston and South Charleston to place and enforce liens for unpaid

sewer charges upon all premises served by the Cities' sewer systems;

5. That the West Virginia Water Development Authority views the lien provisions of the bonds as important financial security provisions of the bond contracts;

6. That the prohibition of placement of liens for unpaid sewer charges on rental properties served by the Cities' sewer systems has deprived the West Virginia Water Development Authority of a substantial part of the means to ultimately collect the money that the Cities owe to it;

7. That, as a result of the prohibition of the placement of liens for unpaid sewer charges on rental properties served by the Cities, the bond contracts between the Cities and the West Virginia Water Development Authority have been substantially impaired;

And further Affiant sayeth naught.

/s/ Daniel B. Yonkosky

Taken, subscribed and sworn to before me, the undersigned authority, on this the 18th day of November, 1993.

My Commission expires: January 17, 1994.

/s/ Barbara B. Meadows

Notary Public

(NOTARIAL SEAL)

APPENDIX G

AFFIDAVIT OF WILLIAM B. COLLISON

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

William B. Collison, being first duly sworn, deposes and says as follows:

1. That he is the Financial Manager of the Sanitary Board of the City of Charleston, and has held such position since January 1986.

2. That he is thirty-six years of age, and has resided in Kanawha County, West Virginia, since 1956.

3. That he was graduated from West Virginia State College in 1981, with a Bachelor of Science in Business Administration, majoring in accounting.

4. That from January 1981 until January 1986 he worked for American Water Works Service Company, where he was employed from January 1981 until June 1983 as a water utility rate analyst, and from June 1983 until January 1986 as a water utility senior internal auditor.

5. That as Financial Manager of the Charleston Sanitary Board, he has overall responsibility for all financial matters involving the Sanitary Board, including, but not limited to, billing, collecting, placing and enforcing liens for delinquent sewer charges on various premises served, preparation of financial statements, preparation and

calculation of projected and actual figures for revenue, expenses, and delinquent accounts.

6. That he is familiar with the history of the Sanitary Board's level of delinquent accounts since January 1986.

7. That he has made an examination of the Sanitary Board's service accounts, of which there are 24,047, and has determined:

(a) That 8,303 (34.5%) of such accounts are for service to rental properties;

(b) That 1,651 of total accounts are delinquent in payment for services rendered;

(c) That 1,210 (73.3%) of the 1,651 delinquent accounts are rental property accounts;

(d) That rental property accounts have a delinquent rate of 14.6%.

(e) That owner-occupied accounts have a delinquent rate of 2.8%.

(f) That an account is considered "delinquent" if a bill is unpaid for sixty days;

(g) That the figures stated in this paragraph were derived from the computerized accounting records of the Sanitary Board by comparing the name in which the service is being billed against the name of the owner of the property. If the names are different, the property is considered to be rental property.

8. That the bond ordinances, attached to the Complaint in Civil Action No. 2:93-0161, now pending in the U.S. District Court for the Southern District of West Virginia, as Exhibits A and B, are:

(a) True and accurate copies of the bond ordinances adopted by the City Council of the City of Charleston, West Virginia;

(b) Issued and outstanding bonds, not having been paid;

(c) Valid contractual obligations between the City of Charleston and the various purchasers of said bonds;

(d) Required to be paid only from revenues generated by the City of Charleston's sewer system operations;

(e) Secured only by a pledge of revenues and by the City's obligation to place and enforce liens on premises served by the sewer system if bills for rates and charges to such premises are not paid.

9. That sewer service is provided to "premises," that is, to discrete physical locations on identified real estate, not to individuals.

10. That sewer service is unlike other utility services in that:

(a) No commodity is provided, as in the case of water, gas, or electric utility service, which could be withheld for non-payment;

(b) No easily withdrawn service is provided, as in telephone utility service;

(c) Once any particular premises are connected to the sewer system, those premises may not, and, in most cases, cannot, be disconnected, even if bills are unpaid.

11. That the Sanitary Board is affirmatively obligated, by both the bond contracts and by West Virginia statute, to place liens on all premises served by the sewer system, when bills for such services are unpaid.

12. That the placing of liens on premises served by the sewer system is one of the most effective methods available to the Sanitary Board to collect delinquent accounts.

13. That the Charleston Sanitary Board operates the sewer systems of Mt. Tyler Public Service District and Guthrie Public Service District, and such operations include, but are not limited to, billing, collecting, and the placing and enforcement of liens on premises served by such sewer systems for unpaid bills.

14. That, based on his experience in supervising the financial aspects of Mt. Tyler Public Service District and Guthrie Public Service District, there is no difference between said Districts' sewer systems and Charleston's sewer system, in the following respects:

(a) The economic and social characteristics of the various areas served, and the persons residing therein, are similar;

(b) There is no broad general social, economic or other societal problem that exists in the

areas served by Charleston's sewer system, that does not equally exist in areas served by the District's sewer systems;

(c) Prior to the enactment of the 1990 Amendment to W. Va. Code 8-18-23(c), the delinquency rates for the Districts' sewer systems and Charleston's sewer system were similar.

15. That the West Virginia Legislature's 1990 Amendment of W. Va. Code § 8-18-23(c), as interpreted and applied by the Public Service Commission of West Virginia, prevents Charleston from placing liens for unpaid sewer charges on rental premises served, while public service districts retain the ability to place liens on rental premises.

16. That the City of Charleston's bond contracts place upon the City the obligation to place liens for unpaid sewer charges on all premises served.

17. That he is aware of no broad, general social, economic or other societal problem in Kanawha County, West Virginia, that would apply to or affect rental property receiving sewer service, that would not also equally apply to or affect owner-occupied property receiving sewer service.

18. That the primary beneficiaries of the prohibition of sewer liens on rental property are owners of rental properties.

19. That if the Public Service Commission of West Virginia had not issued its March 30, 1992, Orders in Copley v. Charleston Sanitary Board (PSC Case No. 90-518-S-C) and Moore v. Sanitary Board of the City of

Charleston (PSC Case No. 91-120-S-C), the Charleston Sanitary Board would have continued to place liens for unpaid sewer charges on rental properties, and would have continued to use every lawful means available to collect unpaid sewer charges from all those liable, including owners of rental properties.

20. That the prohibition of the placement of liens for unpaid sewer charges on rental properties served by its sewer system is a serious and substantial impairment of Charleston's obligations to its bondholders.

And further Affiant sayeth naught.

/s/ William B. Collison

Taken, subscribed and sworn to before me, the undersigned authority, on this the 18th day of November, 1993.

My Commission expires May 19, 2003.

/s/ Grace M. Wagner